



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 11, 2003

Mr. Steven M. Kean
Senior Assistant City Attorney
City of Tyler - Legal Department
P.O. Box 2039
Tyler, Texas 75710

OR2003-1571

Dear Mr. Kean:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177708.

The City of Tyler (the "City") received a request for the following five categories of information that concern the City's Solid Waste Department:

- 1) "[D]ocumentation of all correspondence between City officials paid or otherwise between Olympic/Allied/Laidlaw Waste Services . . . for the last 12 months to this date[.]"
- 2) "[A] list of all commercial customers by address[.]"
- 3) "[T]he current rates paid by those customers[.]"
- 4) "[D]ollar amounts of Road Use Fees paid by Olympic/Allied/Laidlaw Waste Services by month, January - November 2002."
- 5) "[M]onthly yardage picked up within the city limits by Olympic/Allied/Laidlaw Waste Services as required by the City of Tyler section 16 - 11 of the City of Tyler Code of Ordinance to maintain City License Agreement."

You inform us of your intent to release information responsive to categories one and four upon receiving a deposit from the requestor for costs associated with copying and producing the requested information. In addition, you explain the City has no information directly responsive to category five. Further, you assert information pertaining to category three is

excepted from disclosure under section 552.104 of the Government Code. You also contend the City need not provide information responsive to category two pursuant to section 552.027 of the Government Code. We have reviewed the representative sample of information you submitted and we have considered your claims.¹

Section 552.027 provides:

- (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a *commercial book or publication* purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
- (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.
- (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027 (emphasis added). This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. You explain City personnel would incur an unnecessary and burdensome task if required to provide a list of customers by address. A governmental body may not refuse to comply with an open records request merely because it would be difficult to do so. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Further, you contend the requestor can obtain such information from telephone directories and other commercially available sources. However, we believe your argument circumvents the critical element of the request. The requestor specifically seeks the City's Waste Disposal Department's "list of customers." The telephone directory contains the businesses operating in the City, but it does not identify which ones are customers. Furthermore, in your brief, you state the City has "several methods of locating the address of a commercial business contracting with the City for waste disposal services[.]" The City states this information can be found in its computer. Thus, the "list of customers" is not specifically in "a commercial book or publication" as required

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

for exception under section 552.027. Therefore, we find you have failed to demonstrate that the information came from the type of commercial book or publication contemplated by section 552.027. Accordingly, we conclude that the submitted document is "public information" and, therefore, subject to the Public Information Act (the "Act"). As you raise no other exception to the required public disclosure of the list of commercial customers by address, the City must release this information to the requestor.

Next, we consider whether section 552.104 of the Government Code excepts information responsive to category three of the request. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 protects the government's interests when it engages in certain commercial transactions. For example, a governmental body generally invokes section 552.104 to except information submitted to it as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. However, when a governmental body seeks protection as a competitor, we have stated that it may claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must show actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is insufficient to invoke section 552.104. *See id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *See id.* at 5, 10.

To establish the applicability of section 552.104, you inform us Tyler Code of Ordinances, sections 16-3b and 16-5a, which you have submitted for our review, permit a business establishment to contract with either the City or an approved commercial hauler for waste disposal services. Further, you state the City "directly competes with commercial haulers, including the Requestor, IESI, to provide waste disposal services within the City limits." Based on these representations, we find the City qualifies as a "competitor" in the private marketplace of waste disposal services for purposes of section 552.104. Thus, the City may avail itself of section 552.104 protection for its information, provided the City demonstrates actual or potential harm to its competitive interests if it released the information at issue to the public. In your brief, you explain that from mid-1995 to 1999 the Solid Waste Department lost approximately \$15,000 in monthly revenue when United Disposal, the predecessor of the requestor, undercut the City's waste disposal rates. Since that time, you indicate the City has improved revenues in this area by adjusting rates downward as authorized by the City Code of Ordinances. Further, you inform us the City publishes the maximum allowable rates in its Code of Ordinances; however, you contend releasing the

individual rates paid by each commercial customer would unfairly advantage competing haulers as competitors, armed with this information, could undercut the City's adjusted rates. Also, you argue the City would not have reciprocal access to the rate information of its private industry competitors. Based on our review of your arguments and the submitted information, we find the City has demonstrated that requiring release of the individual rates paid by the City's customers would result in actual or potential harm to its interests in a particular competitive situation. Accordingly, we conclude the City may withhold the current rates paid by its commercial customers from disclosure pursuant to section 552.104 of the Government Code.

Last, we address the City's contention it possesses no information directly responsive to category five of the request for information. Several provisions of the Act imply a governmental body need not prepare new information to comply with the Act; the Act applies to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. You inform us the City "does not have any exact figures responsive" to the request for the "[m]onthly yardage picked up in the city limits by Olympic/Allied/Laidlaw Waste Services[.]" You explain because these companies dispose of all waste they pick up in Tyler in the Tyler Landfill (the "Landfill"), the City does not require a monthly disposal plan. Further, you state the waste collected by these companies may include accounts outside the City limits and the City has no mechanism to distinguish between the total amounts delivered to the Landfill by Olympic, Allied, and Laidlaw. Thus, the City does not have information showing the monthly yardage amount for only within the city limits. The PIA requires a governmental body to make a good faith effort to relate a request for information to the information the governmental body holds. Open Records Decision No. 561 at 8 (1990). If the City has no such information, the Act does not require a governmental body to provide information that is not in existence. Open Records Decision No. 362 (1983). Lastly, the City should help the requestor to clarify the request by advising the requestor of the types of information available. Gov't Code § 552.222(b).

In summary, the City must release the list of addresses of its commercial customers and, to the extent they exist, the monthly yardage amounts delivered to the Landfill by Olympic, Allied, and Laidlaw. The City may withhold the rates paid by its commercial customers under section 552.104 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 177708

Enc: Submitted documents

c: Mr. Jim Larsen
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(w/o enclosures)